Hickory's Best, Inc. *and* **Gloria Montes.** Case 21-CA-17176

21 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 March 1982 Administrative Law Judge David G. Heilbrun issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

On 15 November 1979 the Board found that Respondent had discharged several employees in violation of Sec. 8(a)(1) of the Act. It further ordered Respondent to make an immediate and full reinstatement offer to those employees whom it had not already reinstated and it also ordered Respondent to make the employees whole with backpay for loss of earnings. Respondent thereafter denied that it was liable for the sums of backpay set forth in the Regional Director's 13 March 1981 backpay specification. The instant supplemental proceeding thereafter arose. In his Supplemental Decision, the Administrative Law Judge found that Respondent owed the discriminatees the sums of money claimed for them by the General Counsel. For the reasons set forth below, we agree with some, but not all, of the Administrative Law Judge's conclusions.

A. The Administrative Law Judge rejected Respondent's arguments that it had made various valid offers to reinstate the discriminatees which should have tolled their backpay prior to the time set out in the specification. The Administrative Law Judge rejected Respondent's arguments because he found that it is a "fundamental and controlling principle of law that Respondent was at all times obligated to render a full *written* unconditional offer of reinstatement to each of the named discriminatees and until this was appropriately communicated the backpay period of each would continue to run . . . [emphasis added]." Apparently based on this "fundamental and controlling principle," the Administrative Law Judge concluded that none of the arguments advanced by Respondent was sufficient to constitute a valid offer of reinstatement or to toll the accrual of its backpay liability.

Contrary to the Administrative Law Judge, Board law does not hold that valid offers of reinstatement *must* be in writing.[2] We shall therefore independently examine each of Respondent's contentions regarding its alleged offers of reinstatement. We list first those arguments that we find without merit; then we set out our reasons for rejecting them; then we set out those arguments that we find do have merit.

1. At the instant backpay hearing, Respondent offered uncontradicted testimony that, on 30 October 1978,[3] approximately 2 weeks after the charge in the underlying unfair labor practice case had been filed, and on several occasions thereafter, it made offers to reinstate the discriminatees to counsel for the General Counsel but that the latter informed Respondent that he would not communicate those offers to the discriminatees because the offers did not contain backpay. The evidence establishes that Respondent failed to initiate any direct communication with the discriminatees after counsel for the General Counsel had allegedly declined to do so. Respondent contends that its backpay liability should be tolled as of the date that it initially communicated the reinstatement offers to counsel for the General Counsel.

2. Respondent's president, Richard Ferris, testified that as the discriminatees were leaving the plant on 16 October, the day that Respondent had unlawfully discharged them, he instructed interpreters[4] to tell them, *inter alia*, that their jobs were open. Respondent argues that the discriminatees' failure to return to work on that day warrants the tolling of its backpay liability.

3. Charles Steese, Respondent's representative, testified in this proceeding that, on 27 February 1979, during the hearing in the underlying unfair labor practice case, he directed an interpreter to ask approximately five or six of the discriminatees if counsel for the General Counsel had made reinstatement offers to them. While an answer was proffered by one of the discriminatees, the record

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings, except as indicated, *infra*.

[2] See, e.g., *Anderson Plumbing & Heating Co.*, 203 NLRB 18 (1973); and *Moro Motors*, 216 NLRB 192, 193 (1975).

[3] All dates refer to 1978 unless otherwise indicated.

[4] Most of the discriminatees speak only Spanish.

is unclear whether the response was to the alleged question.

4. Respondent points out that, as of the dates of the hearing in the unfair labor practice case, a few of the discriminatees had resumed employment with Respondent. Respondent contends that the fact that some of the discriminatees had been reinstated by the date of the hearing "must have been a topic of widespread conversation at the hearing." Therefore, Respondent contends that "every" discriminatee had "actual knowledge that their jobs were open" and their failure to return to work renders them ineligible for backpay.

5. The record reflects that during a state unemployment insurance appeals hearing, in June 1979, discriminatee Enedina Valdivia in the presence of other employees was asked by a Respondent representative whether she would be "willing to come back to work today." Valdivia responded, "Yes." She was also asked by the same person whether she was aware that her job was open, and she responded, "Well, I didn't know." Respondent urges that we toll its backpay liability with respect to Valdivia and the discriminatees who were with her as of the day of this conversation.

We find no merit in Respondent's above-mentioned contentions. Employees who are discriminatorily discharged are entitled to unequivocal and unconditional offers of reinstatement to their former jobs, if they still exist; and, if those jobs do not exist, then to equivalent positions. The alleged statements of Respondent's interpreter made contemporaneously with the unlawful discharges and the interpreter's alleged remarks at the unfair labor practice hearing are not unequivocal and unconditional offers of reinstatement. Moreover, we regard the assertions regarding the statements made on the day of the unlawful discharges as an attempt to relitigate issues already litigated and resolved in the unfair labor practice case. And Respondent's contention that the discriminatees should have known that their jobs were available based on private conversations with each other does not establish that any offers of reinstatement were ever made to them. Additionally, the statements made to Valdivia amount to little more than an inquiry as to whether she was interested in employment. They do not constitute an unconditional offer of reemployment.

Nor was Respondent absolved of its duty to offer the discriminatees reinstatement by allegedly making an offer of reinstatement through counsel for the General Counsel. First, it is arguable from the record that these offers were made in the course of settlement negotiations. If they were, they are inadmissible under the present circumstances.[5] If they were not made in the course of settlement negotiations, they still do not aid Respondent's case. In this regard, we emphasize that Respondent itself offered testimony that it was aware that the alleged offers had never been communicated to the discriminatees by counsel for the General Counsel. It is well established that an employer who has unlawfully discharged employees has the obligation to remedy its unlawful action "by seeking out the employees and offering reinstatement." *Southern Greyhound Lines*, 169 NLRB 627, 628 (1968). Notification is an integral part of such an employer's obligation and it is not discharged of its duty, as Respondent argues here, when it is fully aware the discriminatees were never notified of its reinstatement offer. Therefore, even assuming, as Respondent alleges, that it made reinstatement offers to counsel for the General Counsel for transmittal to the discriminatees which were not in the course of settlement negotiations, Respondent, whose unlawful conduct required the issuance of the reinstatement order, cannot avoid its notification obligation by alleging that counsel for the General Counsel failed to communicate its offers, particularly since Respondent was fully aware that the discriminatees did not know that it was amenable to their resumed employment.

Quite a different situation exists, however, regarding discriminatee Luisa Sanchez. The record shows that, while Sanchez was at an unemployment compensation office in late January or early February 1979, the interviewer telephoned Respondent official Janet Slatton. According to Sanchez, the interviewer told her that Respondent at that time said that Sanchez' job was open, and that "the boss was asking for us to go back to work." However, Sanchez refused Respondent's offer to return (1) because Respondent had earlier fired her; and (2) because she was pregnant, and she supposedly had been told before her discharge (and at a time when she was not pregnant) by a lady foreman identified only as "Mona" that Respondent would not allow pregnant women to work for it. While Sanchez told the interviewer why she was not returning to work, there is no showing, based on her own testimony, that these reasons were relayed to Respondent.[6]

[5] See *East Wind Enterprises*, 250 NLRB 685, fn. 2 (1980), enfd. 664 F.2d 754 (9th Cir. 1981); Fed. R. Evid. 408.

[6] We note that Janet Slatton also testified and indicated that she told the interviewer that Sanchez' job was still open; that she could come back to work; and that the interviewer told her that Sanchez was returning that day but that Sanchez never returned to Respondent. It appears that the Administrative Law Judge, at least implicitly, credited Sanchez' testimony where it differed from Slatton's. We accept Sanchez' own testimony in finding that Respondent's backpay liability to her was tolled in late January or early February 1979.

The Administrative Law Judge found that, notwithstanding Respondent's offer of employment to Sanchez, Respondent's backpay liability was not tolled. He appeared to so conclude because of his finding that valid offers of employment had to be in writing. We have already rejected that. He also appeared to find that Sanchez could "discount" this offer by Respondent because she was pregnant, and had been told that Respondent did not employ pregnant women. We disagree. First, we find that here, unlike the situation with Valdivia noted above, Respondent clearly made a valid offer of employment to Sanchez. And, based on Sanchez' own testimony, she clearly recognized it as an offer to return to work. But she rejected it on two grounds, both of which are irrelevant to whether the offer was a valid one. First, she appears to have rejected it because Respondent had earlier fired her. Obviously, this action does not mean that Respondent would not later want to rehire her, as it demonstrated here that it did. Second, she rejected the offer because she was pregnant, and had allegedly been earlier told that pregnant women could not work for Respondent. This, too, is irrelevant. First, there is no persuasive evidence that Respondent, in fact, had such a policy or that, if it had such a policy, it would not have waived it under these circumstances. Indeed, the record shows only that a valid offer of employment was made by Respondent and that Sanchez declined it for reasons never communicated to Respondent. In effect, Respondent was never put on notice of Sanchez' pregnancy nor, assuming it had some policy against employing pregnant women, was it put to the test of withdrawing the offer because of Sanchez' pregnancy. Moreover, the Administrative Law Judge intimates that Sanchez' pregnancy was a valid reason for her to reject Respondent's otherwise valid offer. If anything, the proper conclusion is to the contrary—as the General's backpay specification itself suggests. Thus, the General Counsel seeks no backpay for Sanchez from February through July 1979 because of her unavailability for any work due to her pregnancy. If the General Counsel seeks no money for this period, then Sanchez' refusal of Respondent's valid offer because of her pregnancy is, in fact, clearly a ground on which backpay can be tolled, at the very least for the period of the pregnancy. However, the General Counsel would resume Sanchez' backpay entitlement in August 1979 after her pregnancy ended. We disagree, as we find that Respondent made Sanchez a valid offer in late January or early February 1979, which was refused for reasons that she never revealed to Respondent. Further, we note that, even in the face of this earlier offer of employment, there is no evidence that Sanchez, when she was no longer pregnant in August 1979, ever contacted Respondent to seek work. In all these circumstances, we find that Respondent's backpay liability to Luisa Sanchez was tolled in late January or early February 1979.

B. The Administrative Law Judge rejected Respondent's claim that the discriminatees had not engaged in reasonably diligent searches for gainful interim employment. Respondent contends that it should be discharged of backpay liability because the record evidence, particularly the discriminatees' backpay claimant forms, does not establish that the discriminatees were sufficiently active in searching for interim employment. We agree with the Administrative Law Judge on this issue except with respect to discriminatee Eva Perez.

In addition to those points touched on by the Administrative Law Judge in assessing the discriminatees' search for interim employment, we note that the discriminatees, whom the Administrative Law Judge found to be credible witnesses, testified that their job searches were much more extensive than their backpay claimant forms indicated and they testified as to the various reasons for their incomplete forms. Some discriminatees also testified that they had searched for employment at establishments whose names they were unable to recollect at the hearing. It is well established that employees are not disqualified from backpay merely because of poor recordkeeping or uncertainty as to memory. See *Izzi Trucking Co.*, 162 NLRB 242, 245 (1966). In light of all the circumstances and considering the Administrative Law Judge's findings and credibility resolutions, we shall not reverse his findings on this issue except as described *infra.*

In our opinion, Respondent has, in fact, established that discriminatee Perez failed to sufficiently search for employment during a portion of the interim period. At the hearing, counsel for the General Counsel admitted that Perez was in Mexico and not searching for interim employment for a 2-week period from 23 December through 7 January 1979. Respondent argued, however, that Perez' unavailability was a full 3 months based on Perez' asserted admission to two other persons that she had been in Mexico for 3 months following her discharge. The Administrative Law Judge discredited one of these witnesses and credited Perez' denial at the instant hearing that she had spent 3 months following her discharge in Mexico. In so doing, he noted that a transcript of a June 1979 state unemployment compensation hearing at which Perez testified, and which Respondent had introduced into evidence, was "inconclusive on this point." Con-

trary to the Administrative Law Judge, we find that the record is not inconclusive on this point. Thus, the transcript of the June hearing clearly reflects Perez' statement that she had gone to Mexico shortly after 16 October and that she had remained there for approximately "three months." The Administrative Law Judge's crediting of Perez' testimony that she was not in Mexico for the 3 months following her discharge is apparently based on his erroneous finding that the record of the earlier state hearing was "inconclusive" as to Perez' whereabouts during the period of time in question. We therefore find unreliable the testimony given by Perez at the instant hearing. In so doing, we note additionally that the Administrative Law Judge did not discredit the other witness who testified that Perez had said she was in Mexico for 3 months.[7] Accordingly, we shall modify the Administrative Law Judge's recommended Order to reflect a reduction in Perez' total backpay for the 3 months that she was unavailable for employment.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Hickory's Best, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Strike the names "Eva Perez" and "Luisa Sanchez" from paragraph 1.

2. Insert the following as paragraph 2 and renumber the subsequent paragraph accordingly:

"2. Make Luisa Sanchez whole for any loss of pay she may have suffered because of Respondent's discrimination against her for the period from her discharge on 16 October 1978 until the date in late January or early February 1979 when she learned during an unemployment compensation office interview that her job with Respondent was available. Make Eva Perez whole for any loss of pay she may have suffered because of Respondent's discrimination against her for the period from her discharge on 16 October 1978 until the date in October 1978 when she departed for Mexico for 3 months.[8] Backpay is to be computed in the manner set forth for the computation of backpay in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962)."

[7] In finding that Perez was out of the country for only 2 weeks, the Administrative Law Judge also relied on the fact that Perez had indicated on her backpay claimant forms that she had searched for employment during the 3 months Respondent claimed she was in Mexico. We note, however, that Perez filled out these forms many months after the period in question and, in light of the other countervailing evidence presented by Respondent, we conclude she may have erred on this aspect of her claimant forms. Respondent, however, has not shown that other of the discriminatees likewise erred on these forms.

[8] The present record does not permit a more precise determination as to the date of Sanchez' compensation interview in late January or early February 1979 or the date in October 1978 when Perez departed from Mexico.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: On June 24, 1980, the United States Court of Appeals for the Ninth Circuit filed its judgment granting enforcement to an Order of the National Labor Relations Board dated November 15, 1979. This Order alluded to an Administrative Law Judge's Decision dated September 26, 1979, which the Board adopted in the absence of exceptions thereto having been filed.[1] The Decision so adopted found that Respondent had violated Section 8(a)(1) of the Act by discharging 12 employees on October 16, 1978, and required that an immediate and full offer of reinstatement be made to 9 of these employees and that they be made whole with backpay for loss of earnings. The remaining three employees, Ramona Hernandez, Carmen Sanchez, and Eva Perez, were noted to have resumed employment with Respondent earlier in 1979, and as to them only backpay was ordered.

On or about October 8, 1979, written offers of immediate and unconditional reinstatement were made to Gloria Montes, Luisa Sanchez, Agricola Perez, Enedina Valdivia, Angelina de Lozano, Socorro Cardenas, Rosa Sanchez, and, possibly, Sandra Aguilar. Employment was promptly resumed by five of these, while Socorro Cardenas and Rosa Sanchez did not return until November 26 and December 3, 1979, respectively.[2] Controversy having generally arisen over the reinstatement and make-whole remedy, the Regional Director issued a backpay specification on March 13, 1981. In this various backpay periods were alleged, a backpay formula based on use of a representative complement of employees was described, certain interim earnings were admitted, and a total net backpay for each discriminatee was calculated by calendar quarter. Respondent answered this on March 30, 1981, with the following principal assertions:

1. It had not employed the discriminatees on the date found to be alleged as the time of "unlawful discharges" (October 16, 1978).

2. It never had an employee named Carolina Cardenas.

3. No backpay should in any event extend beyond November 6, 1978.

[1] On December 21, 1979, the Board denied a motion of Respondent's "new counsel" to reopen the case and file late exceptions.

[2] Sandra Aguilar did not respond to the offer, if made, and her whereabouts are unknown. Ramona Hernandez, who had returned to work in February, accepted a private settlement from Respondent and the General Counsel's motion to sever her situation from this proceeding was granted.

4. The use of a "representative employee" group for purposes of applying a backpay formula is inappropriate.

The matter was heard at Los Angeles, California, on August 18–21, 1981, as a supplemental proceeding. Upon such record,[3] my observation of the witnesses called, and consideration of post-hearing briefs,[4] I make the following:

FINDINGS OF FACT AND CONCLUSIONS[5]

As an introductory matter it must be observed that much of this 4-day hearing was devoted to: (1) Respondent's development of the notion that various opportunities had arisen during the year period that most discriminatees were out of work for them to have conveniently and successfully inquired if positions were open to them with Respondent and (2) traversing the efforts at seeking or finding interim employment as fragmentarily reported to the Regional Compliance Officer on forms supplied for such purposes by the various discriminatees who actually testified. While the latitude extended in this process resulted in a deceivingly lengthy hearing, the fundamental and controlling principles to apply here were not disturbed. Briefly stated Respondent was at material times obligated to render a full written unconditional offer of reinstatement to each named discriminatee, and until this was appropriately communicated the backpay period of each would continue to run subject only to notions of unavailability for work as such might arise for a diversity of reasons. Secondly, while such discriminatees were under a duty to make a reasonably diligent search for gainful interim employment, the burden of proving that they did not do so rests with Respondent.

It was developed that at the time of the unfair labor practice hearing, this being in February and March of the year and approximately 5 months after the discharges in question, several of the discriminatees should, could, or might have known that Respondent was amenable to their resumed employment and this was tended to be verified by the fact that several of their former coworkers were already back on Respondent's payroll. Additionally, in the case of Luisa Sanchez it was established that in February while at an unemployment compensation office the interviewer contacted Janet Slatton, managerial employee and daughter of Respondent's president, Richard Ferris, and she advised him that a job was open at the time. Luisa Sanchez, Spanish-speaking as were the various discriminatees who appeared as witnesses, testified that this was relayed verbally to her by the interviewer but, credibly, she discounted it because of being pregnant at the time and understanding Respondent's policy not to permit her to be employed under that circumstance. Respondent also sought to show that, during a consolidated hearing later in June on unemployment compensation claims by several of these individuals, there was an implication of jobs being available to them. Finally Respondent infers that through family and cultural ties the discriminatees, or any of them, should have investigated more vigorously whether they could have succeeded in obtaining employment earlier than when they did.

Such matters are irrelevant to the issue of whether and when a valid offer of reinstatement is made to a discriminatee. Here there is no showing of any obstacle to Respondent's ordinary entitlement to communicate such an offer in writing, and any tactical or judgmental reasons for not doing so are immaterial to the point. I therefore conclude that the relatively early resumption of employment by Ramona Hernandez, Carmen Sanchez, and Eva Perez was fortuitous and in itself has no bearing on the right of reinstatement continuing to attach to the remaining nine members of the original group. From this it follows that no valid offer of reinstatement was made to any of the remaining nine until the dates set forth in the backpay specification as the end of their respective backpay periods.[6]

Carmen Sanchez credibly testified that commensurate with her limited schooling and experience she engaged in an immediate daily search for interim employment at various locations, including sewing establishments and meatpacking facilities. Eva Perez credibly testified that commensurate with her limited schooling and experience she engaged in an immediate daily search for interim employment using the public bus system to canvass job prospects in the Los Angeles metropolitan area.[7] Gloria Montes credibly testified that commensurate with her limited schooling and experience she engaged in an immediate search for work that averaged a minimum of 3 days per week and involved newspaper advertisement followups and inquiry of job prospects following suggestions from friends. Luisa Sanchez credibly testified that commensurate with her limited schooling and experi-

[3] Certain errors in the transcript have been noted and are hereby corrected.

[4] The General Counsel's brief inadvertently refers to the transcript of the "back pay proceeding" at 17, whereas the actual exhibit was an excerpt from the transcript of the underlying unfair labor practice hearing. Further, I have fully considered Respondent's various contentions respecting estoppel, the ethics of conduct by Regional personnel, and as based on numerous wide-ranging case precedents, finding such matters largely shrill, speculative, or irrelevant. In sum, I reject all such contentions, believing instead that they do no more than tend to detract from the actual issues of what is a quite traditional backpay proceeding. An additional permeating theme of Respondent's defense in this matter is the direct or indirect attempt to relitigate on the merits, and this, of course, is improper on long-settled grounds.

[5] All dates and named months hereafter are in 1979 unless shown otherwise.

[6] While the technical backpay periods for Socorro Cardenas and Rosa Sanchez extend to the respective November 26 and December 3 dates mentioned above because they were unable to accept the offer until that time, this is counterbalanced as an arithmetical wash because the General Counsel concedes them to have been unavailable for employment and therefore not accruing quarterly gross backpay for the periods August 1–November 25 and October 1–December 2, respectively.

[7] The General Counsel has admitted that Eva Perez was out of the country for a 2-week period from December 23, 1978, until January 7. Respondent contends that her unavailability was a full 3 months based on her asserted admission to employee Eva Herrera that she had been in Mexico for 3 months following her discharge. Eva Perez credibly denied this and a transcript of the proceedings at her unemployment compensation hearing in June is inconclusive on the point. Furthermore, the claimant job search reports of Eva Perez were introduced in evidence showing that for the months of late 1978 at issue she had searched for work and listing various employers where this was sought. Respondent has not demonstrated that such contacts did not in fact occur and I am not persuaded that Herrera's testimony is reliable. For this reason the gross backpay of Eva Perez will be reduced, thus affecting her total net backpay, but only for the length of time which the General Counsel has admitted as her additional unavailability for employment.

ence, and except for the period she was unavailable due to pregnancy, she engaged in a search for interim employment several times a week using public transportation to carry out her own initiative in this process. Agricola Perez credibly testified that she has a ninth grade education but no job training or particular skills and that except for the period of her unavailability because of pregnancy she engaged in an immediate and frequent search for interim employment based on newspaper want ads and stopping at nearby manufacturing facilities. Enedina Valdivia credibly testified that commensurate with her limited schooling and experience she engaged in an immediate search for interim employment involving public bus travels severals times a week to places reached on her own initiative or as suggested to her by relatives. Angelina de Lozano credibly testified that she had extremely limited education and no job skills but that she engaged in an immediate search for interim employment using public transportation several times each week to canvass the metropolitan Los Angeles area for a job. Socorro Cardenas credibly testified that commensurate with her limited schooling and experience she immediately sought interim employment on a near daily basis using public transportation on her own initiative or in followup from want ads seen in Spanish language newspapers. Her only interim employment was obtained for a 2-week period during March at U.S. Industrial Glove; however, she was forced to leave that work because of her reaction to chemicals. Rosa Sanchez credibly testified that she, too, has an extremely limited education and minimal work experience, but that she engaged in an immediate search for interim employment seeking it nearly every day of the week. She obtained employment at National Corset Supply Company in November 1978 and continued working there for about 4 months until laid off. Additionally, she briefly obtained employment at the University of Southern California but did not continue there upon being told that the job was only a few hours per day. She recalled that after this experience her search for work was done on a daily basis with typically three or four prospective employers contacted each day.

Respondent's records disclose that an employee named Carolina Anguiano was employed through October 13, 1978, at which time she "walked off the job." Most of the discriminatees testified that a person known to them as Carolina Cardenas had worked at the plant and was discharged on the same day as the rest of them. Socorro Cardenas was presented with a photograph from Respondent's records of the named Carolina Augiano and identified her as the person known to be Carolina Cardenas. On this basis I conclude that Carolina Anguiano is in fact the same Carolina Cardenas who has been involved in the case from the time I originally listed her as a discriminatee.

As of October 1978 the hourly paid laborers of Respondent were actually on the payroll of an entity known as Chicano Foods. This is a California corporation that has existed for over 10 years with officers and principal stockholders identical to Respondent's. In the summer of 1978 its physical location was moved to be consolidated with Respondent and at that time all rank-and-file employees on Respondent's payroll were transferred to Chicano Foods. This did not involve any change in supervision, workplace of individuals formerly with Respondent as Hickory's Best, or preparation of any new job application. The change was entirely one on paper and significantly this matter was not raised by Respondent at the time of the underlying unfair labor practice proceeding that was tried several months later. It is highly artificial for Respondent to contend, as it does now, that simply because the discriminatees were paid by this entity such a distinction constitutes some legal basis on which to assert that the wrong employer is being proceeded against for backpay purposes. There is every indication of commonality and joint control over the two corporations and this distinction is without significance. Under the circumstances Respondent is now estopped from contending that it is not responsible for backpay obligations to these discriminatees even though they were employed by Chicano Foods because this fact became known to the Regional Compliance Officer when records were examined. Cf. *Circle Transport*, 257 NLRB 902 (1981).

The discriminatees had been laborers working in Respondent's processing (wet) or packing (dry) department. The formal personnel records of this workplace do not differentiate between assignments to these two departments and sporadic interchange of employees between them occurs. Overtime work is also required from time to time with this being more prevalent in the processing department. The Regional Compliance Officer examined all payroll records for the operation and chose seven employees as collectively representative of what the discriminatees would have continued to do absent discrimination against them. The seven in this representative group were expressly chosen because as a composite matter they were earning about the same rate of pay as the discriminatees had been earning when they were discharged, had much the same length of seniority, and were all employed throughout the entire backpay period. Based on these factors the Compliance Officer decided that the lost earnings of the discriminatees could best be reconstructed by using the average earnings of this representative group because it included pay raises that had been extended to them during the backpay period. This was the key distinction between using this as a chosen formula and using a more typical projection based on what the discriminatees had themselves each earned over a measurable past period before their discharge.

It is true that the Compliance Officer could have used past *hours* worked by the discriminatees and projected these forward into the backpay period with adjustments for hourly rate increases as granted to other comparable employees at various points in time. However, this approach would have left for argument the question of whether individual discriminatees would have themselves gotten such increases and it is significant that the overall operation is one in which interchange between the departments and unpredictability of overtime needs are fully present. The testimony of Plant Supervisor Dennis Quinzon fails to show there is sufficient structure to the deployment of personnel so that the representative employee formula is inappropriate. An estimate that 70 per-

cent of all overtime work is done by processing department employees is too loose for controlling significance, and Quinzon could only describe interchange between departments in terms of "usual" and "probable" frequency. While most of the discriminatees worked in packing, it was made clear that Angelina de Lozano and Carmen Sanchez had been processing department employees and Quinzon testified that "switch[ing]" in the past between departments had affected Gloria Montes and Luisa Sanchez. When a respondent has not developed its operations in a clearly segregated fashion, the fact that differing departments are present is not a consequence that will invalidate a reasonably chosen formula. Cf. *Tri-Maintenance & Contractor's*, 257 NLRB 226 (1981).

The Board has wide discretion in selecting a backpay formula appropriate to the circumstances. It need not represent "mathematical exactitude," only reasonably address the question of what they lost by the effects of unlawful discrimination. A "representative employees" formula is common when not arbitrarily applied to the facts. Cf. *NLRB v. Iron Workers Local 378*, 532 F.2d 1241 (9th Cir. 1976). I have considered *Olson Bodies*, 220 NLRB 756 (1975), relied on by Respondent, and find that it is factually distinguishable for purposes of this supplemental proceeding.

The General Counsel successfully amended the backpay specification in regard to Socorro Cardenas by reducing the amount of admitted interim earnings from U.S. Industrial Glove (at which she had only worked for about 2 weeks) from $744 to $226.26. This yields an increase of $517.74 in her total net backpay to $6,104.34. The added unavailability of Eva Perez results in reducing the number of weeks per quarter to 10 in 1978/4 and 8.4 in 1979/1, yielding a reduction in her quarterly gross backpay and, since it is carried directly to the total, her overall net backpay. The new applicable amount for Eva Perez is $2,665.46. Other than these modifications the total net backpay for each of the remaining discriminatees is as shown on pages 2, 4, 5, 6, 7, 8, and 10 of appendix A to the backpay specification. I therefore conclude that Respondent's obligation to nine of the original discriminatees is payment of those sums of money, as adjusted above, set forth in the backpay specification, together with interest as appropriately fixed and compounded. Additionally, and consistent with Board precedent, Respondent shall pay the Regional Director $26,863.64 representing total quarterly net backpay of $7,950.83 and $18,912.81 due Sandra Aguilar and Carolina Cardenas, respectively, and such sum shall be held in escrow by said Regional Director for a period not exceeding 1 year from the date of this Supplemental Decision. At the end of that year, upon application by the Regional Director, an additional year may be granted if the Board deems it necessary. Further, the Regional Director shall make suitable arrangements to afford Respondent, together with the General Counsel's representative, an opportunity to examine these discriminatees should they become available regarding their interim earnings.

On the basis of the foregoing findings of fact, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I particularize my various holdings by issuance of the following recommended:

ORDER[8]

The Respondent, Hickory's Best, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Pay to each of the following employees as net backpay the amount set forth opposite each name, plus interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),[9] less tax applicable withholdings required by Federal and state laws:

Carmen Sanchez	$2,808.03
Eva Perez	2,665.46
Gloria Montes	8,085.30
Luisa Sanchez	4,001.88
Agricola Perez	4,001.88
Enedina Valdivia	8,085.30
Angelina de Lozano	8,085.30
Socorro Cardenas	6,104.34
Rosa Sanchez	5,277.21

2. Transmit to the Regional Director for Region 21, to be held in escrow as provided in this Supplemental Decision, the gross backpay amounts contained in the backpay specification for the following employees in the specified amounts, plus interest,[10] less applicable tax withholdings required by Federal and state laws:

Sandra Aguilar	$ 7,950.83
Carolina Cardenas	18,912.81

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] See, generally, *Isis Plumbing Co.*, 139 NLRB 716 (1962).

[10] As specified in par. 1 of this Order.